In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 53

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WOOSTER DIVISION OF BORG-WARNER CORPORATION,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

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INTRODUCTORY STATEMENT.

The Solicitor General, on behalf of the National Labor Relations Board, has petitioned this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, issued in the above entitled case on September 12, 1956, to the extent that it denied enforcement of an order issued by the National Labor Relations Board.

The question involves a charge by the Board that the good faith insistence by the respondent during the course of collective bargaining upon a *counter-proposal* to a Union demand, as a condition precedent to the execution of an agreement covering wages, hours and other terms and conditions of employment, constituted *per se* a refusal to bargain. The Board contends that those matters properly included in the words "wages, hours and other terms and conditions of employment" are susceptible of determination as a matter of law by some *per se* test of illegality, rather than as a result of the good faith bargaining of the

parties as prescribed by this Court in *National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395.

In order fairly to evaluate the question it is necessary that this Court have before it a more complete statement of the facts than is contained in the Petition of the Solicitor General.

ADDITIONAL STATEMENT OF FACTS.

1. It Is Conceded That in the Advancement of Its Counter-Proposals and in All Other Respects Respondent Acted in Good Faith in Fact Throughout Period of Bargaining Involved.

Both in the hearing before the Trial Examiner and in oral argument before the full Board, the general counsel freely conceded that at all times during the bargaining the respondent had acted in good faith in fact, and no claim to the contrary was ever asserted. This was recognized by the Trial Examiner (R. 389a), both the majority (R. 478a) and the minority (R. 490a) of the Board, and the Court of Appeals (p. 24 of Board's Petition). The majority of the Board determined that respondent's liability "turns not upon its good faith but rather upon the legal question of whether the proposals are obligatory subjects of collective bargaining" (R. 478a); or, as paraphrased by the Court of Appeals, "the Company's insistence upon them to the point of impasse, *even though in good faith*, made the action *illegal per se*" (p. 24, Board's Petition, emphasis supplied).

2. The Counter-Proposal Involved.

The counter-proposal complained of by the Board involved the effort by respondent *to obtain Union agreement* to a limited, no-strike clause which sought, not an absolute ban upon strikes, but only a provision that before a strike should be called it should receive the approval, by ballot, of a majority of the employees in the bargaining unit. The Court of Appeals held that the respondent could properly make this counter-proposal a condition precedent to agreement.

Another counter-proposal involved was that the bargaining agent, identified in the Board's certification as "International Union, United Automobile, etc. Workers of America (C. I. O.)," should agree to describe itself in the preamble to the proposed collective bargaining agreement and execute said agreement as "Local Union 1239, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (U. A. W.-C. I. O.)." (R. 565a-566a.) At the time of the election and certification the Union had not chartered its Local, but before the bargaining commenced the Union's Local No. 1239 was chartered. The *first Union proposals* to which respondent's counter-proposals were made were handed to respondent *by the Union's Local president*, and were denominated as "*Proposal of Local 1239*, U. A. W. C. I. O., to Wooster Division of Borg-Warner Corporation" (R. 154a, 240a; G. C. Ex. 4, p. 8 and Schedule). Ultimately, and after bargaining, the Union and respondent reduced their respective proposals and counter-proposals for the description of the Union in the contract to a matter of emphasis: the Union reducing its proposal to "United Automobile, etc. Workers of America, Local Union No. 1239," and respondent reducing its to "Local Union No. 1239, United Automobile, etc. Workers of America."

On this point the Court of Appeals concurred in the view of the majority of the Board that respondent's continued support of this last counter-proposal constituted *per se* an illegal withholding of recognition of the Union as the exclusive bargaining representative of respondent's employes. As the decision of the Court of Appeals was favorable to it on this point, the Board does not seek to review this aspect of the decision. As the questions raised by the two counter-proposals are of equal significance in the administration of the Act, respondent, concurrently with the filing of this Brief in Opposition, is filing a Cross-petition for a Writ of Certiorari with respect to the decision of the Court of Appeals on this point, seeking a review of this part of the decision of the Court below if this Court should grant the Board's petition involved here.

3. Throughout the Bargaining Involved the Respondent at All Times Recognized, and Met and Conferred With the Union as the Exclusive Bargaining Representative of Respondent's Employees.

There is no claim that the respondent at any time failed, *in fact*, to comply with the requirements of Section 8(d) of the Act "to meet at reasonable times and confer in good faith" with the Union "with respect to wages, hours and other terms and conditions of employment." Nor is there any claim that, *in fact*, the respondent failed at any time to recognize the Union for such purposes as "the exclusive representatives of all the employees" as required by Section 9(a) of the Act.

In the bargaining respondent recognized, met and conferred with the Union's Local representatives and officers, its International representatives, one of its Regional Directors, an Administrative Assistant, its Publicity Director, and an official of its Borg-Warner council (R.

152a, 153a). The facts fully support the finding of the Court of Appeals that "there was no attempt to bargain with the employees instead of the designated representatives. The Union was at all times recognized as the exclusive representative of the employees. The bargaining was done with it, not with the employees. Any requirement * * * would be the result of *an agreement with the Union* to that effect" (p. 26, Board's Brief, emphasis supplied).

4. Prior to the Commencement of Negotiations the Union Had Agreed to Similar No-strike Proposals in Other Labor Contracts.

The particular Union here involved had long recognized the subject matter of respondent's counter-proposal as proper for inclusion in collective bargaining contracts. It had repeatedly included similar no-strike provisions, with employee balloting requirements, of the character contained in respondent's counter-proposal, in its labor contracts with other employers (R. 378a, 381a).

The record further discloses that the same type of limited no-strike provision with employee balloting requirements had been the subject of bargaining and acceptance by other well established and experienced labor Unions in their labor agreements (R. 382a).

5. The Trial Examiner, the General Counsel, the Board Majority, and Minority, and the Court of Appeals, All Recognized That Respondent's Counter-Proposal Was Legal to Make, Legal to Accept, and Legal to Include in a Collectively Bargained Labor Contract.

The trial examiner specifically held "that submission of the Company's proposals did not violate the Act" (R. 431a), and that they could be "adopted if assented to"

(R. 430a). The general counsel stated that he did "not contend that those propositions were matters that could not be proposed by the Company or that they were matters that the Union could not agree" to. (p. 18, Report of oral argument before the Board.) The majority of the Board recognized "that the respondent could make these proposals"; that they were "not in conflict with the provisions of the Act," and that the Union was entirely free to agree to the proposals (R. 479a). Recognition of the validity of this proposition is, of course, implicit in the decision of the Court of Appeals that respondent was not guilty of a failure to bargain with respect to the limited no-strike clause.

The opinion of the two dissenting members of the Board recognized the logical impossibility and complete impracticality of the Board's position that a proposal legal to make, legal to accept and legal to include in a contract could, at some time in the course of bargaining conducted in admitted good faith, become illegal according to some obscure *per se* test, saying:

> "This, I think, is tantamount to holding that the Respondent had no right to put these proposals on the bargaining table, a position not espoused by the General Counsel or adopted by the Trial Examiner. * * * To say that a party has no right to 'bargain' about a bargainable issue is a contradiction in terms which adds confusion rather than clarity to the ground rules of collective bargaining." (R. 493a.)

6. At the Direction of the Union's International Executive Board, a Labor Contract With Respondent Was Ultimately Agreed to and Signed on Behalf of the Union.

The ultimate execution of a collective bargaining agreement not only was consented to but was directed by the International. At page 8 of the Board's Petition it states that on May 5 the bargaining representatives' Local entered into a collective bargaining agreement with the respondent "with the tacit consent of the International." The fact is that the execution of the agreement was originally conceived and specifically directed by the International. This agreement contained the last counter-proposal of the respondent for a no-strike clause.

Four or five of the Union's International representatives summoned local representatives and directed them "to recommend to the membership * * * that we end the strike and go back to work" (R. 364a). The Union's Local president opposed this action (R. 364a), and the Union's Local representatives "didn't have any intention of going in and talking to the Company until the International called us * * * and asked us to talk the membership into going back to work" (R. 365a). Before the contract was signed it was approved by the Executive Board of the International Union in Detroit (R. 362a, 363a, 375a).

ARGUMENT.

The opinion of the majority of the Board and the Board's Petition in this Court depend for their support upon two hypotheses, both of which are false. They are:

(a) That the scope and subject matter of collective bargaining under the Act are susceptible of limitation, as a matter of law, to particular bargaining subjects, by the application of a *per se* test of legality or illegality, and

(b) That respondent's advancement and continued support of its counter-proposals, seeking *Union agreement* to limitations upon the right of respondent's employees to strike, was illegal *per se*, because included in *such agreement* was a provision permitting a ballot of the employees before a strike should actually be called.

On the counter-proposal involved in the Board's Petition the Court of Appeals did not reach the first of such questions. Rather, it determined that the subject matter of the counter-proposal, limiting the right to strike, was clearly one involving wages, hours, or other conditions of employment and, therefore, subject to unrestricted bargaining by the parties.

A. The Decision Below is Consistent With the Decision of the Court of Appeals for the Seventh Circuit in the Allis-Chalmers Case, the Only Other Decision of a Court of Appeals on the Point.

In *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374, the Court of Appeals for the Seventh Circuit considered the right of an employer to bargain collectively for a limited no-strike clause, substantially identical in language to that involved in respond-

ent's counter-proposal. The Seventh Circuit reached a conclusion identical with that of the Court below.

These two decisions are the *only* decisions in which Courts of Appeals have passed upon the question. They concur in the conclusions that such a counter-proposal is one with respect to wages, hours and conditions of employment, and that *seeking Union agreement* to an employee ballot, under such circumstances, in no way derogates the Union's representative status. A very brief reference to the opinions themselves will illustrate.

1. The counter-proposal dealt with conditions of employment.

"The phrase 'conditions of employment,' for example, has not yet acquired precise definition." (213 F. 2d 374 at 377). "The bargaining area of the Act has no well defined boundaries; the phrase 'conditions of employment' has not acquired a hardened and precise meaning * * *. The area of compulsory collective bargaining is obviously an expanding one." (p. 25, Board's Petition).

"We start with the conceded premise that a proposal for a non-strike clause is * * * within the area of collective bargaining * * *. That they * * * have a right through their duly certified bargaining representative * * * to waive such right must be inherent in the concession that a no-strike clause is statutory." (213 F. 2d 374 at 378). "* * * The Board concedes that a no-strike clause is within the area. * * * The qualified no-strike proposal of the Company should not be classified differently." (p. 25, Board's Petition).

2. The counter-proposal, since it sought only Union agreement, did not derogate the Union's status as the employees' exclusive bargaining agent.

"Neither do we think that the present proposal constitutes an effort by the Company 'to dictate to

the employees and their chosen bargaining representative, the mechanics to be utilized in determining whether to go out on strike' different from that which could be ascribed to the no-strike clause. * * * True, there may be a difference in the two situations. Such difference, however, does not affect the right of the employer to propose and to insist on bargaining; it may *affect the decision of the Union* as to whether it will accept or refuse the proposal." (213 F. 2d 374 at 378, emphasis supplied.)

"In the present case there was no attempt to bargain with the employees instead of the designated representatives. The Union was at all times recognized as the exclusive representative of the employees; the bargaining was done with it, not with the employees. Any requirement that the employees approve the action of the Union would be the result of *an agreement with the Union* to that effect." (p. 26, Board's Petition, emphasis supplied.)

B. The Decision Below Does Not Conflict, But Is Consistent With the Decisions of the Courts of Appeal for the Fourth and Fifth Circuits.

Petitioner contends that the decision below cannot be reconciled with the decision of the Fourth Circuit in *National Labor Relations Board v. Darlington Veneer Co.*, 236 F. 2d 85, and that of the Fifth Circuit in *National Labor Relations Board v. Corsicana Cotton Mills*, 178 F. 2d 344. In fact, the decision below conflicts with neither and is consistent with both.

The decisions in *Darlington Veneer* and *Corsicana Cotton Mills* are both clearly distinguishable from the decision of the Court below and the Court below was correct in so holding.

At no time in the instant case did respondent ever seek to meet, confer or otherwise bargain or negotiate

directly with its employees. At no time did it ever suggest or propose that any collective bargaining agreement which might result from the negotiations should have validity only if ratified by the employees. At all times respondent's negotiations were only with the Union. All such negotiations, including the counter-proposals involved, looked toward agreement *only with the Union.* No agreement or ratification of a Union agreement with respect to such counter-proposals was ever sought or suggested. The Union was at all times free to reject the counter-proposals. They could have life only in the event of Union acquiescence.

In *Darlington Veneer* the employer refused to accept Union agreement to a contract as binding upon the employees, but rather required that the contract negotiated should be "effective * * * only after ratification by the employees." (236 F. 2d 85 at 87). Similarly, in *Corsicana Cotton Mills,* the employer urged a contract provision "to the effect that non-Union employees *should have a right to vote upon the provisions of the contract* negotiated by the Union as bargaining agent." (178 F. 2d 344 at 345).

Acceptance of the employer's position in either *Darlington Veneer* or *Corsicana Cotton Mills* would have reduced the Union to a mere messenger, with its powers limited *to recommending* to the employees terms and conditions of employment. Under such provisions *the power of agreement* was confined to the employees, *to the exclusion* of the bargaining agent. The clause proposed in *Darlington Veneer* for automatic nullification of the agreement, should the number of check-off authorizations fall below fifty per cent of the number of employees, falls into the same category. By this proposal the employer took the position that the Union's representation depended, not upon the Board's certification, but upon a test completely

foreign to the statute, i.e., the number of check-off authorizations.

None of the factors vitiating the employers' proposals in *Darlington Veneer* and *Corsicana Cotton Mills* was present in respondent's counter-proposal. The distinction between this case and the *Darlington Veneer* and *Corsicana Cotton Mills* cases was clearly recognized and lucidly explained by the Court below as follows:

> "In the present case, there was no attempt to bargain with the employees instead of the designated representatives. The Union was at all times recognized as the exclusive representative of the employees; the bargaining was done with it, not with the employees. Any requirement that the employees approve the action of the Union would be the result of an agreement with the Union to that effect. * * * The facts in that case [Corsicana Cotton Mills] go far beyond the present case. In that case the certified representative would have been unable to make *any* binding agreement with the employer, who as a practical matter would be dealing with all of the employees in agreeing upon the terms of the contract." (pp. 26, 27, Board's Petition, emphasis the Court's).

As both the Court below and the Seventh Circuit in *Allis-Chalmers* recognized, respondent's counter-proposal did not seek to deal directly with the employees, or to interfere in the internal efforts of the Union, or to determine, *independent of Union agreement*, how or under what circumstances a strike might be called. Rather, pursuant to the admonition of this Court in *Ford Motor Co. v. Huffman*, 345 U. S. 330, 337-338, it recognized the Union's "discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." As the Court below pointed out, the individual

employees could have no voice whatsoever in the question of a strike *except as "the result of an agreement with the Union* to that effect." (p. 26, Board's Petition). Or, as the Seventh Circuit said, such participation was dependent upon *"the decision of the Union* as to whether it will accept or refuse the proposal." (213 F. 2d 374 at 378).

Even in *Darlington Veneer* the Court did not hold the employer's proposal subject to any *per se* test of illegality. Rather, its conclusions were that the employer's proposals "were put forward in the thought that they would not be accepted and for the purpose of avoiding and not arriving at an agreement * * *.", and "insistence upon such provisions * * * is so unreasonable * * * as to furnish of itself a sufficient basis for the finding by the Board of failure to bargain in good faith; * * *.", and "* * * we think that the Board was fully warranted in finding that the Company had failed to bargain in good faith * * *." (236 F. 2d 85 at pp. 87, 88 and 90 respectively). *In this case the fact that respondent at all times bargained in complete good faith has never been questioned.*

C. The Decision Below Does Not Conflict With the Decisions Listed in the Board's Cumulative Citations in Support of Darlington Veneer and Corsicana Cotton Mills.

At pages 13 and 14 of the Board's Petition, and particularly in footnote 8 on page 14, the Board includes a long list of citations cumulative to the alleged rule of *Darlington Veneer* and *Corsicana Cotton Mills.* To distinguish these cases in detail by a specific discussion of each is neither appropriate nor necessary here. Each of these cases, however, is distinguishable from the instant case for one or more of the following reasons:

1. They were decided before and without reference to this Court's decision in *National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395, that "the duty of bargaining collectively is to be enforced by the application of the *good faith bargaining standards* of Section 8(d) *to the facts of each case* * * *." (Emphasis supplied); or

2. Under the facts of the particular case there involved and contrary to the conceded facts of this case,

(a) The employer refused, *in fact*, either to recognize and bargain with the certified bargaining representative, through agents of the latter's selection, or to recognize and bargain with such persons *as the acknowledged agents* of the certified representative. Cf. *National Labor Relations Board v. Louisville Refining Co.*, 102 F. 2d 678, certiorari denied, 308 U. S. 568; *American Laundry Machinery Co. v. National Labor Relations Board*, 174 F. 2d 124; *National Labor Relations Board v. Aldora Mills*, 180 F. 2d 580, enforcing 79 N. L. R. B. 1; *National Labor Relations Board v. Taormina Co.*, 207 F. 2d 251; *National Labor Relations Board v. Pecheur Lozenge Co.*, 209 F. 2d 393, certiorari denied, 347 U. S. 953; *National Labor Relations Board v. Griswold Mfg. Co.*, 106 F. 2d 713; *Madden v. International Union, etc.*, 79 F. Supp. 616; *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. 2d 748, certiorari denied, 313 U. S. 565; [1] *May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376; *National*

[1] (Decided by the same Court *and Judge* that decided *Allis-Chalmers.*)

Licorice Co. v. National Labor Relations Board, 309 U. S. 350; *National Labor Relations Board v. George P. Pilling & Son Co.*, 119 F. 2d 32; *Hartsell Mills Co. v. National Labor Relations Board*, 111 F. 2d 291; *National Labor Relations Board v. H. G. Hill Stores*, 140 F. 2d 924; *Hill v. Florida*, 325 U. S. 538; or

(b) Although bargaining was conducted by the employer with agents designated, for the purpose, by the certified employee representative, such bargaining *was not conducted in good faith in fact*, and, therefore, transgressed the rule of *American National Insurance*. Cf. *National Labor Relations Board v. Aldora Mills*, 180 F. 2d 580, enforcing 79 N. L. R. B. 1; *National Labor Relations Board v. Taormina*, 207 F. 2d 251; *National Labor Relations Board v. George P. Pilling & Son Co.*, 119 F. 2d 32; *Hartsell Mills Co. v. National Labor Relations Board*, 111 F. 2d 291; *National Labor Relations Board v. H. G. Hill Stores*, 140 F. 2d 924; or

(c) The employer recognized the certified bargaining agent as the representative of less than all of the employees involved. Cf. *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. 2d 748, certiorari denied, 313 U. S. 565; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350; *Hartsell Mills Co. v. National Labor Relations Board*, 111 F. 2d 291; or

(d) The proposals of the employer inherently contravened the purposes or the specific mandate of the Act and, therefore, violated the Act the moment they were made or proposed. Cf. *National Labor Relations Board v. Dalton Telephone Co.*,

187 F. 2d 811, certiorari denied, 342 U. S. 824 (refusal to sign contract after agreement actually reached); *National Labor Relations Board v. Pecheur Lozenge Co.*, 209 F. 2d 393, certiorari denied, 347 U. S. 953; *Hartsell Mills Co. v. National Labor Relations Board*, 111 F. 2d 291; *National Labor Relations Board v. H. G. Hill Stores*, 140 F. 2d 924; *Hill v. Florida*, 325 U. S. 538.

D. The Basic Question Presented Has Already Been Decided by This Court in the American National Insurance Co. Case.

In *NLRB v. American National Insurance Co.*; 343 U. S. 395, as in the case here, the Board charged an employer with a *per se* violation of Section 8(a) (5) because it "insisted" upon a contract provision permitting it to retain unilateral control of certain terms and conditions of employment. There as here, the employer's position was by way of counter-proposal to a Union demand on the same general subject. There as here, the Board conceded that the proposal was legal to make but contended that ""insistence" upon it at some time became illegal *per se*.

This Court's summary rejection of the Board's *per se* approach, coupled with its clear analysis of why Congress measured the duty of an employer under Section 8(a) (5) by his good faith and by no other yardstick, appears from the following excerpts from its opinion:

> "The Board offers in support of the portion of its order before this Court *a theory quite apart from the test of good faith bargaining* prescribed in Section 8(d) of the Act, a theory that respondent's bargaining for a management functions clause as a counter-proposal to the Union's demand for unlimited arbitration was, '*per se*,' a violation of the Act.

"*Counsel for the Board do not contend that a management functions clause covering some conditions of employment is an illegal contract term.*

* * * * *

"If the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry *or such other evidence of good faith as the fact in this case that respondent's clause was offered as a counterproposal to the Union's demand for unlimited arbitration.* The Board's argument is a technical one for it is conceded that respondent would not be guilty of an unfair labor practice if, instead of proposing a clause that removed some matters from arbitration, *it simply refused in good faith to agree to the Union proposal for unlimited arbitration.* * * *

"Conceding that there is nothing unlawful in including a management functions clause in a labor agreement, *the Board would permit an employer to 'propose'* such a clause. *But the Board would forbid bargaining for any such clause* when the Union declines to accept the proposal, *even where the clause is offered as a counterproposal to a Union demand* * * *.

* * * * *

"Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of *labor* agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, *not by the Board.* * * *

"Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. * * * The duty to bargain collectively is to

be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry *from bargaining for management functions clauses altogether.*" (pp. 404 to 409; emphasis added.)

CONCLUSION.

The decision of the Court of Appeals, with respect to which the Board seeks review, is correct. It is not in conflict with the decision of any other Court of Appeals, and is in harmony with the decision of the Court of Appeals for the Seventh Circuit in *Allis-Chalmers*, and with the decision of this Court in *American National Insurance*.

The Petition for Writ of Certiorari should be denied.

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